Supreme Court, U.S.
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No. 94-1923

In The

Supreme Court of the United States

October Term, 1995

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

JUSTINE LAI and ELVIRA VIERNES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether Congress intended there to be a "knowing agreement" to arbitrate federal and state statutory employment discrimination claims before an employee may be deemed to have waived the statutory court remedies of Title VII and related state statutes.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Justine Lai and Elvira Viernes, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 42 F.3d 1299 (9th Cir. 1994).

STATEMENT OF THE CASE

Justine Lai and Elvira Viernes (hereinafter "plaintiffs") filed suit against The Prudential Insurance Company of America (hereinafter "Prudential") in Los

Angeles Superior Court alleging sexual harassment under the California Fair Employment and Housing Act (hereinafter "FEHA"), California Government Code §12900 *et seq.* and related tort causes of action.[1] Plaintiffs alleged that their supervisor at Prudential sexually harassed and sexually assaulted them by subjecting them to, among other things, forced acts of fellatio, sexual intercourse and masturbation. Petitioner's Appendix (hereinafter "App.") 3-4, 18-19.

Prudential filed a Petition to Compel Arbitration and Stay State Court Proceedings under the Federal Arbitration Act (hereinafter "FAA"), 9 U.S.C. §1 *et seq.* in the United States District Court for the Central District of California. App. 18. The district court granted Prudential's Petition. App. 22. The Ninth Circuit vacated the district court's order and remanded the case with instructions to dismiss Prudential's complaint. App. 14.

Plaintiffs worked for Prudential as sales representatives. Before or during the course of their employment, plaintiffs were required to sign Uniform Applications for Securities Industry Registration (hereinafter "U-4 forms") containing agreements "to arbitrate any dispute, claim or controversy that . . . is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register." App. 3. Plaintiffs registered with the National Association of Securities Dealers (hereinafter "NASD") which required that "any dispute, claim or

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[1] The related tort causes of action are for: (1) assault; (2) battery; (3) intentional infliction of emotional distress; and (4) negligent supervision.

controversy . . . arising in connection with the business of [NASD] members" be arbitrated. App. 3, 19.

Plaintiffs allege that when they signed the U-4 forms, they were told that they were applying to take a test, that they were directed to sign the forms without being given an opportunity to read them, that no one at Prudential mentioned arbitration, and that they were never given a copy of the NASD manual, which identifies those disputes required to be arbitrated. App. 3.

The district court granted Prudential's petition based on its broad interpretation of the NASD arbitration provision, which required "business disputes" to be arbitrated. It concluded that the NASD arbitration clause covered employment disputes. App. 20.

The Ninth Circuit reversed on two grounds. First, it held that Congress intended there to be a "knowing agreement" to arbitrate employment disputes before an employee may be deemed to have waived the statutory court remedies of Title VII and related state statutes. App. 14. Given that the U-4 form did not describe the types of disputes that were to be arbitrated, the appellate court concluded that plaintiffs could not have known that they were agreeing to arbitrate sex discrimination claims. In addition, the Ninth Circuit held that even assuming plaintiffs signed an arbitration agreement containing the NASD arbitration provision, they would not have known that they were agreeing to arbitrate Title VII claims because the NASD arbitration provision did not cover employment disputes.

Prudential then filed a petition for rehearing and suggestion for rehearing en banc which was denied.

REASONS WHY THE PETITION SHOULD BE DENIED

Prudential seeks review of the Ninth Circuit's holding that Congress, when enacting the Civil Rights Act of 1991, intended that there be a "knowing agreement" to arbitrate before an employee will be deemed to have waived the statutory court remedies of Title VII and related state statutes. Review by this Court is unnecessary for three simple reasons.

First, although the Ninth Circuit's decision rests on two separate holdings, Prudential does not seek review of the holding which is dispositive of the ultimate outcome of this case. Even assuming this Court were to grant review and decide in Prudential's favor, the Ninth Circuit's second holding, that the NASD arbitration provision requiring arbitration of "business disputes" does not include employment disputes, will remain intact and determines the final outcome of this case.

Second, the Ninth Circuit is the first circuit court to address the question of congressional intent relating to agreements to arbitrate federal and state statutory discrimination claims, as reflected in the text and legislative history of the Civil Rights Act of 1991. Therefore, no square conflict exists for this Court to resolve.

Finally, by amending its code of arbitration procedure in October, 1993, specifically to include employment disputes, the NASD effectively resolved the

primary and determinative issue of this case and substantially diminished the potential impact of the Ninth Circuit's opinion.

For these reasons, review by this Court is neither appropriate nor necessary and should be denied.

1. The Question Raised By Prudential Is Not Dispositive Of The Ultimate Outcome Of This Case

Plaintiffs will retain their right to statutory court remedies, even if this Court were to grant review and decide that they "knowingly agreed" to arbitrate "business disputes", because the Ninth Circuit's holding that "business disputes" does not include employment disputes is final and dispositive of the outcome of this case.

A. The Ninth Circuit's Decision Rests On Two Separate Holdings

The question raised before the Ninth Circuit was one of arbitrability: whether plaintiffs entered into a binding agreement to arbitrate their federal and state statutory employment discrimination claims. App. 9.

The Ninth Circuit found the agreement to arbitrate contained in the U-4 forms executed by plaintiffs to be unenforceable for two reasons. Based on its review of the text and legislative history of the Civil Rights Act of 1991, the Ninth Circuit found that Congress intended individuals to "knowingly agree" to arbitrate federal and state statutory employment discrimination claims and that, by executing their U-4 forms, plaintiffs did not "knowingly contract to forego their statutory remedies in favor of

arbitration." App. 14. This first holding was based on the undisputed fact that the "U-4 form did not purport to describe the types of disputes that were to be subject to arbitration." App. 13-14.

The Ninth Circuit also decided the underlying question of the proper interpretation of the NASD arbitration provision requiring arbitration of business disputes and held, as did the Seventh Circuit in *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253, 1255 (7th Cir. 1993), that it did not cover employment disputes.[2] App. 14.

Prudential raises only the question of whether the Ninth Circuit properly interpreted Title VII, as amended by the Civil Rights Act of 1991, to require a "knowing agreement" to arbitrate federal and state statutory employment discrimination claims and not the ultimately determinative question of whether the Ninth Circuit properly interpreted the NASD arbitration provision. Petition, 7-8.

B. Even if This Court Were To Rule In Prudential's Favor On The Question Presented, The Outcome Of This Case Would Be The Same

Review by this court of the question raised by Prudential will not change the ultimate outcome of this case. Assuming *arguendo* that this Court were to grant review and rule in Prudential's favor that plaintiffs entered into

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[2] The NASD arbitration provision was amended in October, 1993, to specifically include employment disputes. See Section 3, *infra*.

an enforceable agreement to arbitrate "business disputes," the Ninth Circuit's second holding would determine the ultimate outcome of this case. Because Prudential has not raised the question of the proper construction of the pre-amendment NASD arbitration provision, the Ninth Circuit's holding that said provision does not include employment disputes is final and not subject to further review. Therefore notwithstanding a decision from this Court in Prudential's favor, plaintiffs would not be required to arbitrate their sex discrimination claims.

2. The Ninth Circuit's Opinion Does Not Squarely Conflict With Decisions Of This Court And Other Circuit Courts

Prudential asserts that the Ninth Circuit's opinion conflicts with this Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Allied-Bruce Terminix Companies, Inc. v. Dobson*, ___ U.S. ___, 115 S.Ct. 834 (1995) and other circuit court decisions. However, neither this Court nor other circuit courts have addressed and decided the question raised by Prudential: whether Title VII, as amended by the Civil Rights Act of 1991, requires a "knowing agreement" to arbitrate federal and state statutory employment discrimination claims. Therefore, no square conflict exists which requires resolution by this Court.

A. The Ninth Circuit's Opinion Is Consistent With This Court's Decision In *Gilmer* And Its Progeny

Prior to this Court's decision in *Gilmer*, Title VII had been interpreted to prohibit prospective waivers of the right to a judicial forum for Title VII claims. *Alexander v. Gardner - Denver Co.*, 415 U.S. 36, 51-52 (1974). In *Gilmer*, however, this Court held that claims brought under the Age Discrimination Employment Act ("ADEA"), 20 U.S.C. §621 *et seq.* may be the subject of an arbitration agreement, enforceable under the FAA. *Gilmer*, 500 U.S. at 35.

Gilmer has been extended to apply to claims brought under Title VII as well. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487-88 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699-700 (11th Cir. 1992); *Mago v. Shearson Lehman Hutton. Inc.*, 956 F.2d 932, 935 (9th Cir. 1992); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991).

The Ninth Circuit strictly adhered to the holding of *Gilmer* and based its decision on the underlying premise that Title VII claims may be subject to an arbitration agreement. App. 9. Thus the Ninth Circuit's opinion does not squarely conflict with the holding of *Gilmer*.

In support of its argument that the Ninth Circuit improperly refused to enforce the arbitration agreement contained in the U-4 form, Prudential relies heavily on *Gilmer* and its unfounded contention that *Gilmer* is determinative of the question presented. However, Gilmer is

distinguishable from the present case in several material respects.

The plaintiff in *Gilmer,* unlike plaintiffs in this case who registered with the NASD, registered with the New York Stock Exchange (hereinafter "NYSE"). Rule 347 of the NYSE specifically provided for arbitration of "any controversy . . . arising out of the employment or termination of employment of such registered representative." *Gilmer,* 500 U.S. at 23. Based on *Gilmer's* execution of a U-4 form *and* the NYSE rules which specifically provided for arbitration of employment disputes, this Court concluded that *Gilmer* entered into an enforceable agreement to arbitrate his ADEA claim.

Moreover, Congress passed the Civil Rights Act of 1991 shortly after this Court handed down its decision in *Gilmer.* Therefore, this Court did not have the opportunity to address the question of whether the text and legislative history of the Civil Rights Act of 1991 reflects a congressional intent to require "knowing agreements" to arbitrate federal and state statutory discrimination claims. In addition, no other circuit court has considered and decided this precise issue.[3]

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[3] None of the cases cited by Prudential as being in conflict with the Ninth Circuit's opinion addressed this issue. (See Petition, p. 12 fn. 6; 23-24.) *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 39 F.3d 1482 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.,* 971 F.2d 698 (11th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.,* 948 F.2d 305 (6th Cir. 1991); and *Alford v. Dean Witter Reynolds, Inc.,* 939 F.2d 229 (5th Cir. 1991) (Title VI claims may be subject to mandatory arbitration.) *Kidd v. Equitable Life Insurance Soc. of U.S.,* 32 F.3d 516 (11th Cir. 1994) (the NASD arbitration provision requiring arbitration of business disputes included employment disputes.)

Thus, the "knowing agreement" standard articulated by the Ninth Circuit has not been considered or rejected by any court of appeals or this Court. Accordingly, no square conflict exists which requires resolution by this Court.

Prudential also contends that the Ninth Circuit's opinion is "incompatible with *Gilmer.*" Petition, p. 18. Even assuming that an incompatibility exists, it does not rise to the level of a square conflict requiring this Court's review.

Furthermore, Prudential's claim of incompatibility is illusory. In *Gilmer,* this Court rejected challenges to the adequacy of the NYSE arbitration procedures and concluded that the procedures adequately protected *Gilmer's* substantive rights. *Gilmer,* 500 U.S. at 30-32. Prudential incorrectly asserts that "the Ninth Circuit denied enforcement of an otherwise valid arbitration agreement by relying on the 'particularly significant' procedural protections . . . available to a plaintiff in a Title VII sexual harassment lawsuit." (Petition p. 17.) The Ninth Circuit did no such thing.

Rather, the court cited to the procedural protections available in California to Title VII plaintiffs as further justification for its conclusion that Congress intended to require "knowing" agreements to arbitrate Title VII claims and not as a basis for denying "an otherwise valid arbitration agreement." App. 13.

Prudential also strains to create an inconsistency with *Gilmer* by suggesting that the Ninth Circuit posed a conflict between policies favoring arbitration and those

forbidding discrimination that "the Court in *Gilmer* already had debunked." Petition p. 17.

A review of the Ninth Circuit's opinion reveals no such inconsistency. Rather, the court merely stated that "the public policy of protecting victims of sexual discrimination and harassment," which is at least as strong as the policy in favor of arbitration, underlies Congress' intent that Title VII claims be arbitrated only " 'where appropriate' " and when "knowingly" accepted. App. 12.

Finally, Prudential claims that the "knowing agreement" standard conflicts with one of the underlying principles of this Court's decision in *Gilmer*: an agreement to arbitrate statutory claims involves only a waiver of the right to a judicial forum and not a waiver of substantive rights afforded by the statute. Petition, 17. Prudential suggests that the "knowing agreement" standard resembles a test for waiver of substantive rights and is therefore inconsistent with *Gilmer* and *Washington v. New York City Bd. of Estimate*, 709 F.2d 792, 797 (2d Cir. 1983) ("the test of waiver that is applied to other constitutional rights . . . is not applicable to the right to trial by jury.").

Prudential's claim of inconsistency in principle is unfounded. The Ninth Circuit based its "knowing agreement" standard on Section 118 of the Civil Rights Act of 1991 ("Where appropriate and to the extent authorized by law, . . . arbitration, is encouraged.") and its legislative history ("where the parties knowingly and voluntarily elect to use these methods"), and not on any distinction between the waiver of procedural and substantive rights.

Congressional intent is determinative of the question before this Court. Any claimed comparison of the "knowing agreement" standard to a test for waiver of substantive rights is irrelevant to the question presented for review.

B. The Ninth Circuit's Opinion Is Consistent With This Court's Decision In *Allied-Bruce Terminix Companies, Inc. v. Dobson* and *First Options of Chicago v. Kaplan*

Prudential claims that the Ninth Circuit's "knowing agreement" standard "conflicts with this Court's recent opinion in *Allied-Bruce Terminix Companies, Inc v. Dobson*, ___ U.S. ___, 115 S.Ct. 834 (1995), fosters pre-arbitration collateral litigation and undermines the purpose of the FAA. Petition 8, 13-14. Prudential's arguments are fundamentally flawed in several respects.

In *Allied-Bruce Terminix*, this Court broadly interpreted Section 2 of the Federal Arbitration Act, which makes enforceable a written arbitration provision in "a contract evidencing a transaction involving commerce," to mean that the transaction, in fact, involved interstate commerce, even if the parties did not contemplate an interstate commerce connection. *Id.* at 893.

In so holding, this Court rejected an interpretation adopted by other courts requiring the parties to a contract to have "contemplated" an interstate commerce connection. *Id.* at 841. In an effort to create a conflict where none exists, Prudential relies on the following rhetorical

question posed by this Court when rejecting the "contemplation of the parties" interpretation: "Why would Congress intend a test that risks the very kind of costs and delay through litigation (about the circumstances of contract formation) that Congress wrote the Act to help the parties avoid? (citations omitted.)" *Id.*

Based on the above-cited rhetorical question, Prudential asserts that the "knowing agreement" standard "promises to foster pre-arbitration collateral litigation, contrary to an important purpose of the FAA to limit litigation." Petition, p. 13. By posing its rhetorical question, this Court did not suggest that allowing a court to decide arbitrability issues, such as whether an employee "knowingly agreed" to arbitrate Title VII claims, is contrary to the purpose of the FAA. Moreover, Prudential's argument is based on a gross mischaracterization of the underlying purpose of the FAA and is inconsistent with this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S.Ct. 1920 (1995).

"[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate (citation omitted)." *Allied-Bruce Terminix*, ___ U.S. at ___, 115 S.Ct. at 838. "The basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, (citations omitted) but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms.' " *First Options*, ___ U.S. at ___, 115 S.Ct. at 1925. Prudential's assertion that the FAA's purpose is to limit litigation is clearly unsupported by the law and is inaccurate.

In addition, this Court's decision in *First Options* cuts to the heart of Prudential's claim that the "knowing agreement" standard is contrary to the FAA's purpose because it "promises to foster pre-arbitration collateral litigation."

In *First Options*, this Court held that a court, rather than an arbitrator, should decide the question of arbitrability unless there is "clear and unmistakable" evidence that the parties agreed to arbitrate the question of arbitrability. *Id.* at 1924. The presumption in favor of arbitration, which applies when determining what disputes the parties agreed to arbitrate, is reversed when the issue is whether the parties agreed to have the arbitrator decide issues of arbitrability. *Id.*

Neither the text of the FAA nor its underlying purpose precluded this Court from reaffirming a standard which includes the risk of pre-arbitration litigation. In fact, this Court dispelled any notion that the FAA's purpose is to resolve disputes as quickly as possible and rejected First Options argument that its holding would cause delay and waste in the resolution of disputes. *Id.* at 1925. Thus, the fact that a particular standard may require a court, rather than an arbitrator, to determine certain pre-arbitration issues does not create a conflict or inconsistency with the purposes of the FAA, as Prudential suggests.

Therefore, the Ninth Circuit's "knowing agreement" standard is entirely consistent with both the underlying purpose of the FAA and this Court's recent decisions in *Allied-Bruce Terminix* and *First Options*.

3. The Impact of the Ninth Circuit's Opinion Is Limited Because the NASD Amended Its Arbitration Provision To Specifically Include Employment Disputes

Based on wild hyperbole and gross speculation, Prudential argues that the potential impact of the Ninth Circuit's opinion is "enormous." Petition, pp. 28-29. Prudential baldly asserts that "the 'knowing agreement' standard will invite a party to resist arbitration, even when the applicable arbitration agreement expressly requires arbitration of statutory employment discrimination claims" and that few private agreements to arbitrate (not contained in a U-4 form) "contain language specifying statutory employment discrimination claims as covered." Petition, p. 29, fn. 16, 17. Such unsubstantiated and unfounded claims, as well as Prudential's exaggerated predictions of chaos and disaster, are not worthy of consideration by this Court.

In fact, the impact of the Ninth Circuit's opinion is quite limited given that the NASD amended its arbitration provision in October, 1993 specifically to include employment disputes. Section 8(a) of the NASD Code of Arbitration Procedure was amended to require arbitration of any dispute "arising out of the employment or termination of employment." *Kresock v. Bankers Trust Company*, 21 F.3d 176, 178. (7th Cir. 1994).[4] The NASD also amended Section 9 of its Code to provide that under certain circumstances employment disputes would be

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[4] The October 1, 1993 amendments to the NASD Code of Arbitration are reproduced in the Appendix to this Opposition.

decided by a panel consisting of a majority of public arbitrators. *Id.*

The NASD effectively answered the underlying dispositive question of the proper interpretation of the pre-amendment NASD arbitration provision requiring arbitration of "business disputes." Accordingly, the Ninth Circuit's opinion will apply only to a limited number of cases which involve U-4 forms executed before October 1, 1993.

CONCLUSION

For the reasons stated, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's Opinion in this case.

DATE: July 24, 1995

Respectfully Submitted,

BARBOZA & ASSOCIATES

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CODE OF ARBITRATION PROCEDURE

Amendments to October 1, 1993 Edition

On October 1, 1993, Section 41.(f) was amended to make all arbitration awards, their contents, and the names of arbitrators publicly available. For public customer cases, this rule change will apply to awards rendered on or after May 10, 1989. For industry cases, including employment disputes, this rule change will apply to awards rendered on or after October 1, 1993.

Awards

Sec. 41.(f) All awards and their contents shall be made publicly available.

* * *

On October 1, 1993, Sections 1 and 8 were amended to clarify that employment-related disputes are arbitrable under the Code.

PART I. ADMINISTRATIVE PROVISIONS

Matters Eligible for Submission

Sec. 1. This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII. Section 1(a)(3) of the By-Laws of the National Association of Securities Dealers, Inc., (the Association) for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member,

with the exception of disputes involving the insurance business of any member which is also an insurance company:

(1) between or among members;

(2) between or among members and associated persons;

(3) between or among members or associated persons and public customers, or others; and

(4) between or among members, registered clearing agencies with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures, and participants, pledgees or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency.

* * *

PART II. INDUSTRY AND CLEARING CONTROVERSIES

Required Submission

Sec. 8. (a) Any dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) by and with such member, shall be arbitrated under this Code, at the instance of:

(1) a member against another member;

(2) a member against a person associated with a member or a person associated with a member against a member; and,

(3) a person associated with a member against a person associated with a member.

* * *

On October 1, 1993, Section 9 was amended to provide that under certain circumstances employment disputes would be decided by a panel consisting of a majority of public arbitrators. This provision applies to cases where a panel has not yet been appointed as of October 1, 1993.

Composition of Panels

Sec. 9 (a) In disputes subject to arbitration that arise out of the employment or termination of employment of an associated person, and that relate exclusively to disputes involving employment contracts, promissory notes or receipt of commissions the panel of arbitrators shall be appointed as provided by Sections 9(b)(i), (b)(ii) or 10 of the Code, whichever is applicable. In all other disputes arising out of the employment or termination of employment of an associated person, the panel of arbitrators shall be appointed as provided by Sections 13 or 19 of the Code, whichever is applicable.

(b)(i) Except as otherwise provided in Section 9(a) or 10 of the Code, in all arbitration matters between or among members and/or persons associated with members, and where the amount in controversy does not exceed $30,000, the Director of Arbitration shall appoint a

single arbitrator to decide the matter in controversy. The arbitrator chosen shall be from the securities industry. Upon the request of a party in its initial filing or the arbitrator, the Director of Arbitration shall appoint a panel of three (3) arbitrators, all of whom shall be from the securities industry.

(ii) Except as otherwise provided in Section 9(a), in all arbitration matters between or among members and/or persons associated with members and where the amount in controversy exceeds $30,000, a panel shall consist of three arbitrators, all of whom shall be from the securities industry.